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INTERNATIONAL COOPERATION AND JUDICIAL [MUTUAL] ASSISTANCE

Working paper submitted by South Africa and Lesotho

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I. INTRODUCTION

The following draft for part 7 of the statute, pertaining to international cooperation and judicial assistance, has been prepared as a working paper for the August meeting of the Preparatory Committee on the Establishment of an International Criminal Court. The contents of the draft do not necessarily reflect the views of the Governments of South Africa and Lesotho. The purpose of the draft is to assist discussions at the August meeting on cooperation between the court and national jurisdictions.

This draft is based on part 7 of the International Law Commission's draft statute and the corresponding provisions of the updated Siracusa draft statute. Furthermore proposals made, and specific drafts submitted, by delegations during the first session of the Preparatory Committee have been incorporated into the document. Apart from references to the ILC and Siracusa draft statutes in footnotes and recognition that the proposal for articles 28 and 29 have been made by Canada, no other contributions have been attributed to specific delegations. The delegations of South Africa and Lesotho have also had the benefit of other delegations in the preparation of this document.

All additions to the text of the ILC draft statute appear in italics. In regard to certain provisions alternative wordings are indicated. Where the wording of provisions still requires particular consideration, such wording has been inserted in square brackets.

II. DRAFT ARTICLES AND EXPLANATORY NOTES

PART 7. INTERNATIONAL COOPERATION AND JUDICIAL[MUTUAL][1] ASSISTANCE

ARTICLE __

OBLIGATION TO COOPERATE AND GENERAL PROVISIONS[2]

1. *States parties shall, in accordance with the provisions of this Part, cooperate with the Court in its investigation and prosecution of crimes under this Statute. A State shall not deny a request for cooperation except as specifically provided in this Part.*

2. *[Requests for cooperation may be made by the Court, [or Prosecutor] and shall be transmitted through diplomatic channels, unless the Court and the requested State agree on another mode for transmitting the requests.]*[3]

3. *Where non-cooperation by States with requests by the Court [or Prosecutor] prevents the Court from performing its duties in terms of this Statute, the Court may request the Security Council to take the measures necessary to enable the Court to exercise its jurisdiction, in relation to both States Parties to this Statute, or States not parties.*

4. *The Court may call on any State not party to this Statute to provide assistance* [4] *provided for in this Part on the basis of comity, an ad hoc arrangement, or through entry into agreement with such State.*[5]

5. *[Requests for cooperation shall be in an official language of the Requested State unless otherwise agreed.]*

6. *States Party to this Statute shall inform the Registrar of any conditions under their*

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[1]Not all assistance is provided by judicial authorities. "Mutual assistance", which is developing into a term of art, may be a better option and has throughout the text been inserted in square brackets after "judicial".

[2]This provision reflects the need for a general statement of the obligation of States to cooperate with the Court, and related matters.

[3]An alternative would be to provide that "Communications relating to a request under this Part shall be between the Registrar, or Prosecutor acting under Article 26, and the national authority designated by each State party for this purpose."

[4]See Syracusa draft art 56. This preferrable to Art 56 of the ILC draft which formulates the same principle in the form of an entitlement to States which are not a party to the Statute. It appears more correct to formulate the principle as empowering the Court to request cooperation, leaving the reaction of the requested State open.

[5]This could form the substance of a separate article. It should also be considered whether a provision should be added providing that the Court shall have the power to respond to any counter-request by such a State that has been requested to cooperate.

laws that requests for cooperation and judicial[mutual] assistance are required to comply with, and of any amendments to such laws.

ARTICLE 51

COOPERATION AND JUDICIAL[MUTUAL] ASSISTANCE[6]

1. *[States Parties shall afford to the Court the widest possible measures of judicial[mutual] assistance]* OR *[States have the obligation to provide assistance to the Court]*[7] in connection with any investigations and proceedings under this Statute.[8]

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[6]The ILC draft Statute co-mingles provisions of mutual assistance on the one hand, and arrest and surrender on the other. In this text these two aspects have been separated into two distinct provisions, respectively articles 51 and 53. Each provision contains its own provisions relating to the obligation to cooperate and the grounds for denial of the request.

[7]The success of the Court depends on the effectiveness of the provisions pertaining to cooperation by States with requests for assistance. In this regard the imposition of a definite obligation on States to cooperate, as opposed to a more vague provision allowing a discretion on whether to cooperate, should be considered. The argument for the former option is that a rigid and absolute obligation, allowing for no discretion to States party which accept the jurisdiction of the Court, would be crucial to, and strengthen, the prinicple of complementarity. Consideration could be given to making the same rigid principles applicable to requests by States with preferent jurisdiction over a crime

[8]Another option is to couch this provision in reciprocal terms.

2. The Registrar, *or the Prosecutor [in the performance of his functions under Article 26]*[9], may with respect to a crime *under Article 20* transmit a request *in accordance with Article 57*[10] to any State *Party* for cooperation and judicial[mutual] assistance, *pertaining to*[11]:

a. the identification and whereabouts of persons *or the location of items*;

b. the taking of testimony and the production of evidence;

OR

the taking and production of [testimony or other] evidence and statements of persons[12];

c. the service of documents;

d. *the temporary transfer of persons in custody, with their consent, in order to provide testimony or other assistance to the Court;*

d.bis *assisting in the [making available/ transfer] of other persons not in custody, in order to provide testimony or other assistance to the Court*[13];

e. *the conduct of on site investigations and inspections*[14];

f *permitting the Court to sit on its territory for the purpose of taking of evidence or of conducting a proceeding before the Court;*

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[9]See Article 26(2)(e) which empowers the Prosecutor to seek the assistance of States or the UN. Article 26 refers to pre-indictment requests. Requests by the Prosecutor after the indictment could also be provided for.

[10]See the note under article 52 in this document. If elements of article 57 of the ILC draft Statute are slotted in as article 52, bringing them into close proximity of these assistance provisions, this reference would change to "Article 52".

[11]Paragraph (j) is already a catch-all, obviating the need for "including, but not limited to"

[12]Other aspects that could be included in this provision are "including records of government" in regard to the production of evidence, and "whether or not under oath" with regard to statements.

[13]The problem of the arrest and forcible transfer of recalcitrant witnesses to the Court creates problems for many States. Provision could be made in the Rules of the Court for the Court to accept testimony recorded by the requested State in alternative ways, for instance by way of video recordings (see footnote 26 below). Another alternative would be to allow the Prosecutor/Court to take a deposition from such a witness within the territory of the requested State, provided of course that the defence would also be allowed to cross examine the witness if the Prosecutor takes the deposition.

[14]See ILC draft Statute article 26(2)(c). It has been observed that this is also a form of cooperation. This provision as drafted is conceivably wide enough to allow not only the Prosecutor to utilise it, but the Court as well.

g. executing searches and seizures[15]*;*

h. provision of originals and certified copies of relevant records and documents;

i. taking action as permitted by law to prevent injury to, or the intimidation of, a witness or the destruction of evidence[16]*;* or

j. any other assistance [not prohibited by the law of the requested State[17]*] which the Court may require*[18]*.*

3. *With regard to a request pertaining to a crime under*[19]:

(a) *Article 20 (a) to (d), all States Parties;*

(b) *Article 20 (e)*, States Parties which have accepted the jurisdiction of the Court with respect to the crime in question,

shall respond without undue delay to the request.

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[15]This provision appeared as a provisional measure in article 52(1)(b) of the ILC draft Statute.

[16]These measures also appeared in the ILC draft Statute as provisional measures.

[17]If inserted here, this qualification may only apply to paragraph (j), and not all the forms of assistance provided for in this article. The aim is, however, to allay concerns States may have regarding the open-endedness of the provision.

[18]Despite the open-endedness created by this paragraph, it should be considered whether there are any other forms of assistance that need to be specifically provided for.

[19]The final wording of this provision, as well as that of the whole article, depends on which crimes are ultimately included under the jurisdiction of the Court. This drafting reflects a situation where the core crimes are under the inherent jurisdiction of the Court. If treaty crimes are excluded initially and a provision is inserted for the revision of the list of crimes, then a proviso could be considered along with such revision provision, providing for the cooperation by a requested State that has accepted the expanded jurisdiction of the Court with regard to the crime in question.

4. *[A State Party[20]] may, within 28 days of receiving a request under paragraph 2, file a written application with the Registrar [,or with the Prosecutor where the request is made by the Prosecutor during the investigation phase,] requesting that the Court set aside the request on specified grounds. Pending a decision of the Court on the application, the State concerned may delay complying with paragraph 3, but shall take any provisional measure necessary to ensure that assistance can be given at a later moment.*[21]

OR

[States Parties and the Court shall give absolute priority to the request under paragraph 1 of this Article even over concurring requests from other States not having primary jurisdiction according to this Statute.[22]*]*

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[20]Does this refer to any State Party, or only a requested State Party?

[21]An expressed concern is that this provision could allow States to, in bad faith, block or delay compliance with requests for assistance. It has been pointed out that it is not in accordance with State practice for a State to challenge the decision of another State to request assistance. Does the provision therefore serve a useful purpose in the context of the ICC? Two views are that-(a) the provision opens up other grounds for denial of a request, in direct opposition to the intention that the grounds for refusal should be exhaustively ennumerated in the Statute; and (b) that the provision is necessary. It allows for a useful interplay between the Court and national jurisdictions in order to allow the latter to better (in view of the principle of complementarity) take an informed decision.

[22]If the first option is found to be undesirable in view of arguments reflected in footnote 20, this alternative, reflecting a reciprocal and rigid obligation approach, could be considered.

5. (a) *A requested State Party may deny a request for assistance, in whole or in part, if*[23]:

(i) *except for the crimes under Article 20(a) to (d), it has not accepted the jurisdiction of the Court with respect to the offence which is the subject of the investigation or prosecution; or*

(ii) *[the action requested is prohibited by the law of the requested State*[24]*]*

OR

[the authorities of requested State would be prohibited by its domestic laws from carrying out the action requested with regard to the investigation or prosecution of a similar offence in that State];

(iii) *execution of the request would seriously prejudice its security [,ordre public] or other of its essential interests*[25]

(iv) *[if the request would be manifestly ungrounded]; or*

(v) *[if the request is not made in conformity with the provisions of this Article.]*

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[23]The PrepCom generally felt that the grounds on which the request may be refused should be limited in nature and should be specifically spelt out in the Statute. In this regard *ne bis in idem* could also be considered for inclusion, as well as manifest errors of fact or law by the court, and a statute of limitations if such a provision is included.

[24]This provision should not allow proliferation of grounds for refusal of a request on the basis of national law. The grounds for denial should remain limited to only those contained in this Statute. This provision is intended to cover the situation where, for instance, telephone tapping is requested and the law of the requested State does not allow such action. Consideration could also be given to formulating the provision in positive terms, for instance that " compliance with a request for assistance shall be in accordance with the national law of the requested State".

[25]The inherent danger of this provision is that it is possible to interpret it so broadly as to be ultimately counterproductive to the obligation to provide assistance. In this regard a proposal has been made to, where a witness refuses to give evidence on the basis of not wishing to disclose government secrets, provide for the Court to approach the State concerned to confirm the status of the information. The Court would then have to abide by the classification of that State.

(b) [Except where the Court has determined that a case is admissible under section 35, the requested State may postpone or refuse assistance where, in its opinion, execution of the request would interfere with an ongoing investigation or prosecution of the same matter in the requested State or in another State [or with a completed investigation or prosecution of that matter that might have led to an acquittal]]

OR

[A State may deny a request for assistance, in whole or in part, if:

(i) execution would interfere with an ongoing criminal investigation or proceeding in that State; or

(ii) execution would conflict with an obligation to provide assistance to another State in its investigation or prosecution.

(b.bis) Assistance may not be denied on the basis of paragraph (b)(i) or (b)(ii) if the Court has already declared the case giving rise to the request for assistance to be adminssible, and

(i) in a case under paragraph (b)(i), its decision took into consideration the investigation or proceedings pending in the Requested State; or

(ii) in a case under paragraph (b)(ii), the other State is a State party, and the Court's decision took into consideration the investigation or proceedings in the other State.]

(c) Before denying a request for assistance, the requested State shall consider whether the requested assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later time or in an alternative manner[26]: Provided that if the Court or the Prosecutor accepts the assistance subject to conditions, it shall abide by them.

(d) If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for the denial.

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[26] In this regard it is conceivable that testimony could, for instance, be recorded electronically and made available to the Court in that format. It should be considered whether it is necessary to include a specific provision to the effect that the Court will be allowed to receive and consider such testimony. See footnote 13 above.

6. *The Court shall ensure the confidentiality of evidence and information except as required for the investigation and proceedings described in the request.*

7. If requested, the Court shall *reciprocally cooperate with and*[27] provide assistance to a State Party conducting an investigation *into actions which constitute a crime under* this Statute.

Note: A provision setting a time-threshold for cooperation could be considered.

ARTICLE 52: PROVISIONAL MEASURES

NOTE: In view of the proposal at the first session of the Preparatory Committee that provisional arrest be included under the provisions of Articles 28 and 29 (as pre-indictment arrest and post-indictment arrest) this provision as contained in the ILC draft Statute could be deleted[28]. The provisonal measures pertaining to protection of evidence and witnesses can be seen as assistance measures and have been inserted under article 51(2).

If this is done, the current ILC draft Statute's article 57 pertaining to the form and contents of the request could be inserted here as article 52, bringing it in closer proximity to article 51 which it applies to.

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[27]Some support exists for providing a reciprocal obligation on the Court to also provide assistance to States.

[28]It is, however, pointed out that other provisional measures, such as for instance deprivation of freedom through the seizure of passports, may indeed exist that may warrant the retention of this provision if these measures cannot be read in under the catch all provision of article 51(2)(i).

ARTICLE 53

SURRENDER[29] OF *ACCUSED OR CONVICTED PERSONS*[30] TO THE COURT

1. The Registrar shall transmit to any State on the territory of which the accused *or convictd person* may be found the warrant for the arrest and transfer[surrender] of *such person* issued under Article 28, *or in order to enforce the sentence of the convicted person,* and shall request the cooperation of that State in the arrest and *surrender* of *such person.*[31]

2. *A requested State Party on whose territory the accused or convicted person is found*[32] *shall, subject to paragraphs 8 and 9, take immediate steps to arrest and surrender a convicted person to the authorities identified in the warrant of arrest in the case of a convicted person*[33]*, or arrest and surrender an accused to the Court if the case is covered by:*

   (a) Articles 20 (a) to (d) [(a) or Article 23(1)][34]*; or*

   (b) if the requested State has accepted the jurisdiction of the Court with respect to the crime in question.

3. *The requested State Party, if it is a party to the treaty covered by Article 20(e) and has accepted the jurisdiction of the Court, shall give priority to surrender the accused to the Court over requests for extradition from other States.*

   OR

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[29]This article will require especial consideration of the principle of complementarity, and specific drafting to reinforce the principle may be necesary.

[30]It is conceivable that convicted persons may be at large for some reason. It may therefor be necessary to provide for the arrest of such convicted persons. Although this aspect is dealt with under this article, it has been pointed out that it may be more appropriate to deal with this aspect under article 59 (Enforcement of Sentences).

[31]See Art 53(4) of both the ILC and Siracusa drafts.

[32]Apart from stating the obvious fact that, due to the request in all probabilty being transmitted to more than one State, the State on whose territory the person is found should arrest and surrender that person, the text basically accords to art 53(2) of the Siracusa draft. See, however, art 53(2) of the ILC draft.

[33]It is conceivable that a covicted fugitive should be surrendered to the authorities of the State which has been designated as the administering State, and that the warrant would provide for this.

[34]The first option would apply if the ICC was given inherent jurisdiction over the core crimes.

[3. *If the Requested State also receives a request from a state for the extradition of hte same person, either for the same offence or for a different offence for which the Court is seeking the person's surrender, the appropriate authority of the Requested State shall determine whether to surrender the person to the Court or to extradite the person to the state. In making its decision the Requested State shall consider all relevant factors, including but not limited to-*

(a) whether the extradition request was made pursuant to a treaty;

(b) if the offences are different, the nature and gravity of the offences;

(c) the interests of the State requesting extradition, including, where relevant, whether the offence was committed in its territory and the nationality of the victims of the offence;

(d) the possibility of subsequent surrender or extradition between the Court and the State requesting extradition; and

(e) the chronological order in which the requests were received.

3 bis The Requested State may not, however, deny a request for the surrender made under this Article in deference to another State's request for extradition of the same person for the same offence, if the state requesting extradition is a State party, and the Court has ruled the case before it admissible, and its decision took into consideration the proceedings in that State which gave rise to its extradition request.]

4. In the case of a crime to which Article 20(e) applies, the requested State Party, if it is a party to the treaty in question but has not accepted the Court's jurisdiction with respect to that crime shall, where it decides not to surrender the accused to the Court, promptly take all necessary steps to extradite the accused to a State having requested extradition or refer the case to its competent authorities for the purpose of prosecution.[35]

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[35] See Siracusa art 53(4) and ILC art 53(2)(b).

5. In any other case, the requested State Party shall [consider whether it can][36], in accordance with its legal procedures, take steps to arrest and surrender the accused to the Court, or [whether it should] take steps to extradite the accused to a State having requested extradition or refer the case to its competent authorities for the purpose of prosecution.[37]

5.bis A requested State Party may not deny a request for surrender on the grounds that-

i. the person sought is a national of the requested State;

ii. the offence for which the person is being sought is a political or military offence[or an offence connected to such offences][38]*; or*

6. The surrender of an accused to the Court constitutes, as between States Parties which accept the jurisdiction of the Court with respect to the crime in question, compliance with a provision of any treaty requiring that a suspect be extradited or the case be referred to the competent authorities of the requested State for the purpose of prosecution.

7. A State Party which *has accepted* the jurisdiction of the Court with respect to the crime *in question* shall, as far as possible, give priority to a request under paragraph 1 over requests for extradition from other States.[39]

8. *The requested*[40] *State Party may delay complying with a request under paragraph 2 to 4 if the accused or convicted person is in its custody or control and is being*

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[36]Should there be a discretion in this regard? If not, then both the phrases in square brackets in this provision could be deleted.

[37]See ILC draft art 53(2)(c) and Siracusa 53(5).

[38]The separation of provisions dealing with mutual assistance and with arrest and transfer necessitates the insertion in this article of a provision dealing with the grounds on which the request for arrest and surrender may be refused.

[39]See Siracusa draft art 53(7) and ILC draft art 53(4).

[40] Siracusa draft art 53(8). If "requested" is retained here, it should also be inserted at the beginning of the next paragraph for the sake of uniformity. It would, however appear to be redundant due to the specific reference to "request" in both provisions and could therefore be deleted.

proceeded against for a serious crime, or serving a sentence imposed by [a/the][41] Court for a crime. It shall within [28 days] of receiving the request inform the Registrar of the reasons for the delay. In such case it

(a) may agree to the temporary surrender of the accused for the purpose of standing trial under this Statute; or

(b) shall comply with the request under paragraphs 2 to 4 after the prosecution has been completed or abandoned or the sentence has been served, as the case may be.[42]

9. A [*requested*] State Party may, within [*28 days*] of receiving a request under paragraph 1, file a written *request* with the Registrar requesting the Court to set aside the request on specified grounds *including those mentioned in Articles 35 and 42.* Pending a decision of the Court on the application, the State concerned may delay complying with paragraphs 2 *to 4* but shall take any provisional measures necessary to ensure that the accused *or convicted person* remains in its custody or control.[43]

10. *To the extent permitted under the law of the requested State and subject to the rights of third parties, all property found in the requested State that has been acquired as a result of the alleged offence or that may be required as evidence shall, upon request, be transmitted to the Court if surrender is granted, even if the surrender cannot be carried out, on conditions to be determined by the Court.*[44]

11[45]. *(a) A State party shall authorize transportation through its territory of a person being surrendered to the Court by another state. A request by the Court for transit shall be transmitted through diplomatic channels, unless otherwise agreed. The request for transit shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit shall be detained in custody during the period of transit.*

(b) No authorisation is required where air transportation is used and no landing is scheduled on the territory of the State of transit. If an unscheduled landing

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[41] Art 53(8) of the Siracusa draft contains an error here. Either "a" or "the" depending on whether any court, or specifically the ICC is being referred to.

[42] See Siracusa draft art 53(8).

[43] See ILC draft art 53(6) and Siracusa draft article 53(9).

[44] Siracusa draft art 53(10).

[45] The need for a transit provision has been identified.

occurs on the territory of the State of transit, it may require a request for transit as provided for in subparagraph (a). The state of transit shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within 96 hours of the unscheduled landing.

ARTICLE 54

OBLIGATION TO EXTRADITE OR PROSECUTE

NOTE: Due to the insertion of article 53(4), the need for article 54 of the ILC draft Statute falls away. The provisions of the proposed article 54 (Judicial Assistance) of the Siracusa draft have been absorbed into article 51 and therefore do not require incorporation as a separate article.

ARTICLE 55

RULE OF SPECIALITY

1. A person surrendered to the Court under Article 53 shall not be proceeded against, sentenced or detained for any crime other than that for which the person has been surrendered.[46]

2. A State providing evidence under this Part may require that the evidence not be used for any purpose other than that for which it was provided unless this is necessary to preserve a right of the accused under Article 41(2).[47]

3. The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes to be specified in the request. In a case of paragraph 1, the request shall be accompanied by an additional warrant of arrest and by a legal record of any statement made by the accused with respect to the offence.[48]

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[46]See art 55(1) of both the ILC draft and the Siracusa draft. This wording is based on the more comprehensive formulation of the Siracusa draft.

[47]The Prepcom expressed general satisfaction with the limited rule contained in art 55(2) of the ILC draft. The proposed wording reflects the wording of art 55(2) of the Siracusa draft.

[48]Siracusa draft art 55(3). The Prepcom emphasised that the exception to the rule should be based on the express consent or waiver given by the State involved.

ARTICLE 56

COOPERATION WITH STATES NOT PARTIES TO THIS STATUTE

NOTE: This provision has been inserted as subparagraph 4 of the proposed first article of this Part, obviating the need for its inclusion as a separate article.

ARTICLE 57

FORM AND CONTENTS OF THE REQUEST[49]

1. Requests under this Part shall:[50]

(a) be made by letter, fax, e-mail or any medium capable of delivering a written record[, provided that a request shall be confirmed through the diplomatic channel];

(b) *contain* the following, as applicable:

(i) a brief statement of the purpose of the request and the assistance sought including the legal basis [and grounds] for the request;

(ii) information regarding the person who is the subject of the request in sufficient detail to enable identification;[51]

(iii) a brief description of the [essential] facts underlying the request;

(iv) information concerning the complaint or charge to which the request relates and of the basis of the Court's jurisdiction;

(v) in a case covered by Article 28, a written warrant for the provisional

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[49]The deletion of article 52 has been proposed so that the matters previously dealt with as "provisional measures" may be dealt with in articles 28 and 29 as pre-indictment and post indictment arrest. This article could then be slotted in as article 52. If this is done it may be necessary to let the provisions inserted as article 52 deal with the form and content for requests for mutual assistance. A separate provision would then need to be inserted after article 53 to deal with the form and content of a request for arrest and surrender of persons.

[50]Siracusa draft art 57(1), elaborates on ILC draft art 57(1) and (2). The Prepcom was generally satisfied with the ILC draft but indicated that art 57(3) and (4) could be refined more.

[51]At the Prepcom it was proposed that the "identity and location of witnesses" should also be included in this list. This provision appears to be wide enough to encompass witnesses as well.

arrest and surrender of the accused;

(vi) *in a request pertaining to a convicted person, a statement of the existence of a warrant of arrest or a judgement of conviction against the person sought, and a description of the specific offence or offences for which the person has been convicted;* [52]*and*

(vii) *any other information relevant to the assistance being sought;*[53] and

(c) *where applicable and unless otherwise agreed, as soon as practicable be provided to a requested State in the form of a duly certified translation in the official language of that State.*[54]

2. *Communications relating to a request under this Part shall be between the Registrar, or Prosecutor acting under Article 26, and the national authority designated by each State Party for this purpose,*[55], and where appropriate may be made through the International Criminal Police Organisation.[56]

3. *Where the requested State Party considers the information provided insufficient to allow it to comply with the request it may seek, without delay, additional information.*[57]

4. *Provided that the request contains sufficient information to meet the requirements of the relevant law of the administering party, the latter shall execute the request as*

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[52]If the Statute provides for requests pertaining to convicted persons, then this provision could be considered. It could, however, also be argued that paragraph (vii) would be wide enough to cover this situation.

[53]This catch-all provision derives from a proposal during the Prepcom.

[54]To provide for such translations would conceivably facilitate the procedures to be followed in the requested State. The provision as drafted provides for later transmission of the translation. This could avoid delays in urgent situations where the immediate preparation in a specific language could take time.

[55]Siracusa draft art 57-1, with the added provision for requests by the prosecutor during the investigative phase. ILC draft art 57(1) refers only to"between the competent national authority and the Registrar". The Prepcom had some divergence of views on this aspect. The proposed wording is intended to be a compromise that could accomodate all views.

[56]ILC draft art 57(2), Siracusa draft art 57-1(2). This provision has, in this draft, been linked to the provision contained in paragraph 1 of both the ILC and Siracusa drafts.

[57]Siracusa draft art 57(2), which elaborates on ILC draft art 57(4).

expeditiously as possible and transmit the results to the requesting party[58].

PART 8. ENFORCEMENT

ARTICLE 58

GENERAL RULE

States Parties undertake to *abide by* the judgements of the Court[59] *and shall enforce the sentences of the Court in their territory.*[60]

ARTICLE 59[61]

ENFORCEMENT OF SENTENCES

1. [*All States Parties shall assist the Court in enforcing prison sentences by accepting*[62] *convicted persons and thus becoming the adminstering State. A sentence of imprisonment shall be served in a State designated by the Court from the list of available administering States. To that end, the Court shall provide the State so designated with a certified copy of the Court's judgement to be enforced. The State so designated shall promptly inform the Court whether it accepts the request.*

OR

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[58]This provision is drafted in reciprocal terms to allow for the Court to be subject to the same obligation if requested to assist a State.

[59]Siracusa draft art 58. "Abide by" appears preferrable to "recognize" which is contained in the ILC draft art 58. The latter conjures up images of special recognition procedures.

[60]At the Prepcom a view was expressed that art 58 should not only provide for "recognition" of judgements, but also for enforcement of sentences. It should be noted that this is merely a statement of a general rule. Further proposals at the Prepcom where for the inclusion in this article of "States Parties have to recognize the judgements of the court as judgements rendered by their national authorities", and to provide reciprocally that the Court shall recognise the judgements of courts of the State Parties.

[61]For the greatest part the structure and wording of Siracusa draft art 59 is utilised for this article (and the first alternative for subparagraphs 1), as it reflects most of the comments made at the Prepcom.

[62]"Accepting" creates the possibility that this provision does not create a binding obligation. Should an alternative word be considered?

A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons.

2. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State *where the Court has its official seat.*]

OR

1. [*States parties shall enforce the judgement of the Court on designation by the Registrar on [geographical] criteria formulated by Rules of the Court in accordance with the rule of burden sharing.*

2. *No designation to enforce shall be notified to the territorial state, or the state of active or passive nationality.*]

3. *The consent of the sentenced person is not required for the enforcement of a sentence.*

4. *A sentence of imprisonment shall be subject to the supervision of the Court and be enforced:*

   (a) as pronounced by the Court; and

   (b) in accordance with the applicable law of the administering State.

5. *The same applies mutatis mutandis to the enforcement of fines and confiscatory measures. The proceeds therefrom shall be handed over to the Court which will dispose thereof in accordance with the provisions of paragraph 4 of Article 47.*

6. *The Court alone shall have the right to decide on any application for review of the judgement. The administering State shall not impede the sentenced person from making any such application.*

7. ***A sentenced person in the custody of the administering State shall not be subjected to prosecution or punishment for any conduct committed prior to transfer unless such prosecution or punishment has been agreed to by the Court.***

ARTICLE 60

EARLY RELEASE[63]

1. *The administering State shall not release the prisoner before the expiry of the sentence as pronounced by the Court.*

2. *The Court alone shall have the right to decide on the release of a prisoner before the expiry of the sentence and determine the conditions and effects of the release. That decision shall be taken by a Chamber of five judges, who may in arriving at their decision take representations by the administering State or any other interested party into account.*[64]

3. *The prisoner may apply to the Court for a decision according to paragraph 2.*

4. When imposing a sentence of imprisonment, a Chamber may stipulate that the sentence is to be served in accordance with specified laws as to *early release* of the *administering State*. The consent of the Court is not required to subsequent action by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment.[65]

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[63]This wording is based on article 60 of the Siracusa draft which appears to be simpler than the system envisaged under art 60 of the ILC draft. It appears appropriate that the Court should be the authority to decide on matters of pardon, parole and commutation of sentences.

[64]The insertion of the last phrasewould make clear that representations may be made to the Court concerning the release of the prisoner. In ILC draft art 60(1) and (2) it was made especially clear that the early release conditions pertaining in the administering State could be taken into account in determining early release.

[65]ILC draft art 60(4).

TEXT PROPOSED BY CANADA FOR ARTICLES 28 AND 29 PURSUANT TO THE DELETION OF ILC DRAFT STATUTE ARTICLE 52

ARTICLE 28

ARREST

1. At any time after an investigation has been initiated, the Presidency may at the request of the Prosecutor issue a warrant *for the arrest of a suspect before indictment* if:

   (a) there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court; and

   (b) the suspect may not be available to stand trial unless *arrested before indictment.*

2. *(a) The Prosecutor shall transmit the warrant to the State where the suspect is located, along with a request for the arrest of the suspect and a statment of the reasons to believe that the suspect may have committed a crime within the jurisdiction of the Court and that the Prosecutor expects to file an indictment and make a request for indictment within [90 days]. The arrest request should be accompanied by a description of the person sought, together with all available information that will help to identify and locate the person. Where necessary under the law of the State where the suspect is located, the Prosecutor should also provide a brief summary of the facts of the case and the reasons why pre-indictment arrest is believed to be necessary.*

   (b) Where a suspect is arrested before the indictment and an indictment is subsequently filed against the suspect, the Prosecutor shall transmit a copy of the indictment to the State with custody of the accused, along with a request that the accused be surrendered to the Court for trial. The request should be followed by such other additional material as may be required by the law of the State with custody of the accused.

   (c) In the case where a suspect has been arrested before indictment, if before the expiry of [90 days], a decision is taken by the Prosecutor not to indict the suspect or the Presidency decides not to confirm the indictment, the Prosecutor shall immediately advise the custodial State of that fact.[66]

3. *In the case where no pre-indictment warrant has been obtained,* as soon as praciticable after the confirmation of the indictment, the Prosecutor shall seek from the Presidency a *warrant for the arrest of the accused* . The Presidency shall issue

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[66] A concern is that this provision may create constitutional problems for certain States for whom it wold be unacceptable that a person be in custody for a period and then not be indicted. A possible solution is to insert a provision that some form of assurance should be given that an indictment will follow the request for arrest.

such a warrant unless it is satisfied that:

(a) the accused will voluntarily appear for trial; or

(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

3.bis *The Prosecutor shall transmit the warrant to the State where the accused is located along with a request that the accused be arrested and surrendered to the Court for trial. The request should be accompanied by a description of the person sought, together with all available information that will help identify and locate the person. The request should be followed by such other additional material*[67] *as may be required by the law of the State where the accused is located.*

ARTICLE 29

PRE-TRIAL DETENTION OR RELEASE

1. *The State that has received a pre- or post-indictment warrant and a request for the arrest of a suspect shall immediately, in accordance with its law, take steps to arrest the suspect on the basis of the warrant of the Court or by obtaining a domestic warrant for arrest based on the Court's warrant and request.*

2. *A person arrested shall be brought promptly before a judicial officer in the custodial State who shall determine, in accordance with the law of that State, that the person has been arrested in accordance with the proper process and that the person's rights have been respected.*

3. A peron arrested may apply to the Presidency for a determination of the lawfulness under this Statute *of any arrest warrant or order of determination issued by the Court.* If the Presidency decides that the arrest or detention was unlawful *under the Statute,* it shall order the release of the accused, and may award compensation.

3.bis *A person arrested shall have the right to apply to a judicial officer in the custodial State for interim release pending the indictment or surrender of the person. The custodial State shall ensure that the views of the Prosecutor on interim release are brought to the attention of the judicial officer.*

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[67]Only information pertaining to elements of fact, and not of law is envisaged under this provision.

4. A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or if necessary, in the host State.

4.bis *In the case of a person arrested before indictment, if no indictment is received within [90 days] of that person's arrest or the Prosecutor advises the custodial State that no indictment will be filed, the person shall be released from custody or any terms of interim release. The release of the person shall not preclude that person's re-arrest should an indictment and a warrant be submitted at a later date.*

5.bis *An accused surrendered to the Court may apply to the Presidency for interim release pending trial. The Presidency may release the accused with or without conditions if satisfied the person will appear for trial.*